

Hearing Panel Member Training

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University of St. Thomas

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Agenda

- Legal overview and definitions
- The Title IX Process: What happened prior to the hearing?
- Hearing basics
- Hearing preparation
- The hearing
- Making a decision
- Appeals
- Final thoughts
- Questions and discussion



Legal Overview and Definitions

- Title IX basics and key terms
- Title IX personnel and their roles
- VAWA Offenses
- Other types of conduct
- MN State Law



“

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

”

20 U.S.C. § 1681

Title IX Basics

Prohibits gender discrimination in education programs and activities

Applies to students, employees, volunteers, etc.

Includes sexual harassment

Sexual harassment =

conduct on the basis of sex that satisfies at least one of the following:

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

Key terms

- **Reporting party/Complainant:** individual who experienced the sexual harassment
 - **Third-party Report:** A report from someone else about an individual who experienced sexual harassment
 - **Witness:** An individual who may have knowledge about the incident
- **Responding party/Respondent:** individual accused of sexually harassing someone
- **Grievance process:** the investigation process and/or informal process used by an institution to address formal complaints of sexual harassment
- **Formal complaint:** document requesting the institution to move forward with the grievance process. Can be filed by either the reporting party or the Title IX Coordinator.
- **Supportive measures:** resources or accommodations that help either party in the aftermath of a report and/or during a grievance process. Access to supportive measures is not contingent upon pursuing a grievance process.



Essential Compliance Elements

Institutions must:

- Respond promptly in a manner that is not “deliberately indifferent”
- Investigate formal complaints
- Follow and publish the grievance process outlined in the regulations
- Take action to *stop the harassment, prevent the recurrence, and remedy the effects*
- Designate a Title IX Coordinator
- Publish a Notice of Nondiscrimination
- Disseminate a policy prohibiting sex discrimination
- Offer supportive measures
- Conduct training for Title IX personnel and those with heightened responsibilities
- Train students and employees



Title IX Coordinator: Role and Responsibilities

Must designate at least one Title IX Coordinator

Should have significant autonomy and seniority

- Creates and implements legally compliant policy and procedures
- Oversees response to reports and formal complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Training oversight
- Recordkeeping

Investigator: Role and Responsibilities

- Can be internal or external
- Burden to collect sufficient evidence
- Conducts fair, prompt, and impartial investigations
 - Identifies witnesses and evidence
 - Provides parties opportunity to submit evidence
 - Identifies factual issues
 - Maintains records, recordings, etc.
 - Creates an investigation report
- Works in coordination with the Title IX Coordinator, particularly around evidence and report review
- Maintains impartiality and avoids bias
- Receives annual training



Decision-makers: Role and Responsibilities

Hearing Panel Members/Adjudicator(s)

- Attends and conducts a live hearing
- Determines whether the institution's policy has been violated under the appropriate standard of evidence
- Determines sanctions, if necessary
- Writes a Notice of Decision that includes a rationale for the finding
- Avoids bias and conflicts of interest
- Receives annual training

Appeal Officer(s)

- Determines a ruling on a party's appeal by reviewing appropriate investigation/hearing materials
 - Not a "re-do" of the investigation
- May meet with parties
- Writes a Notice of Decision that includes a rationale for the outcome
- Avoids bias and conflicts of interest
- Receives annual training



Training Mandates

Definitions

- Sexual harassment
- Education program or activity

Other

- Institutional policies and procedures
- Any technology for live hearings
- Training materials must be posted on institution's website and maintained for seven years
- Training cannot rely on sex stereotypes

Concepts

- Conducting an impartial investigation and hearing process
 - ... While protecting the safety of complainants and promoting accountability
- Serving impartially, without bias, and without conflicts of interest
- Relevance regarding questions, evidence, and the investigation report
- Dynamics of sexual assault, dating violence, dating violence, and stalking



The Clery Act and the Violence Against Women Act (VAWA)

Clery

- Consumer protection law
- Institutions must provide accurate, timely, and complete information on specific types of crimes that occur on or adjacent to campus, including sexual assault
- Clery Act violations come with significant fines
- Policy, procedure, prevention, and training requirements for
 - Dating violence
 - Domestic violence
 - Stalking
 - Sexual assault
- Requires Annual Security Report including institution's policies and crime statistics

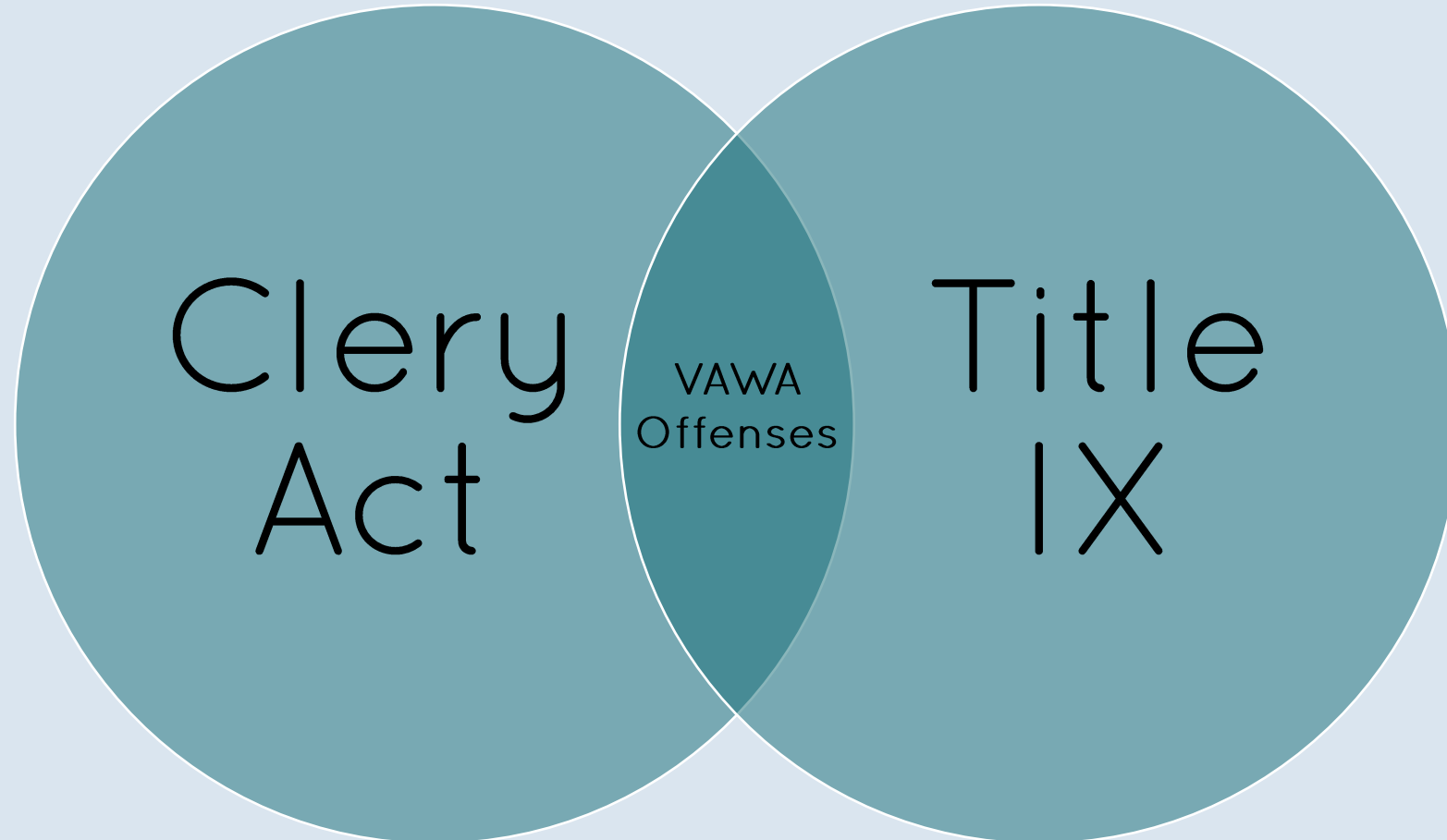
VAWA

Institutions must:

- Prohibit sexual assault, dating violence, domestic violence, and stalking
- Provide clear definitions for the above misconduct and for consent
- Incorporate training and prevention programs for administrators, students, and employees



Relationship between Laws



What about FERPA?

- Right to know what records exist
- Right to dispute accuracy
- Right to control access
 - Legitimate educational interest
 - Reporting Party can know determination
 - Disciplinary sanctions when found responsible for sexual misconduct
- VAWA trumps FERPA

MN State Statute 135A.15

Institutions must:

- Incorporate sexual harassment policy requirements
- Inform victims of their rights
- Include reporting procedures and disciplinary processes in their policy
- Incorporate an amnesty policy
- Coordinate with law enforcement
- Health services must be confidential and screen for sexual violence and harassment
- Provide an online reporting system that permits anonymous reports
- Report annual statistics on sexual assault
- Data privacy stipulations
- Training requirements for administrators, campus security, and students
- [Full Statute Link](#)



When does Title IX apply?

- Defining sexual harassment
- Defining education program or activity
- Parties' relationships with the institution
- When Title IX does not apply



Sexual harassment = conduct on the basis of sex

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

VAWA Crimes

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- Stalking

Hostile Environment Considerations

- Perspective of a “reasonable person” (consider age, abilities, positions of authority, etc.)
- Is it “severe, pervasive, **and** objectively offensive”?
- Does the conduct deny “equal access”? Does not need to be a total or complete loss of access, but *equal*?
- Consider the type of misconduct, how often it happened, where it took place, etc.



Examples of Sexual Harassment

- Unwelcome sexual flirtations, advances, touches, or propositions
- Verbal abuse of a sexual nature
- Requests for sexual favors
- Recording video or photographs of a sexual nature without consent
- Cyber harassment
- Punishing or threatening to take adverse action against a subordinate or student for refusing to comply with sexual demands

Sexual Assault

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Incest: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law



Sexual Assault contd.

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent

Sexual assault with an object: The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Consent



Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.

Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include: sleep, unconsciousness, or intermittent consciousness
- Signs include: slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- **Frequent decision point for adjudicators:** *1) Was the complainant incapacitated; and 2) did or should the respondent (or a reasonable person) know/have known?*

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Domestic Violence

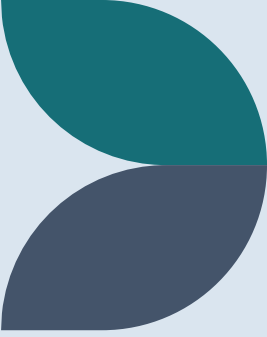
A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under domestic or family violence laws
- By any other person against an adult or youth Complainant who is protected from that person's acts under domestic or family violence laws.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

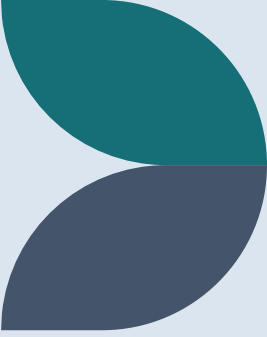


Sexual exploitation

A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.

What are some examples of sexual exploitation?



Retaliation

Any intimidation, threats, coercion, or discrimination against any individual because the individual has made a report, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

Education Program or Activity under Title IX

What does it mean?

- Locations, events, or circumstances...
- On or off campus...
- Over which the institution exercises substantial control over the context in which the harassment took place.

Additional requirements:

- Must have occurred within the United States.
- Includes conduct that occurred in any building owned or controlled by an officially recognized student organization.
- Institution must also have exercised substantial control over the responding party.



Parties' relationship with the institution

Reporting Party

Must be participating or attempting to participate in the institution's education program or activity at the time of filing a Formal Complaint.

**Broad interpretation of "participating or attempting to participate in"*

Responding Party

An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

**But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.*

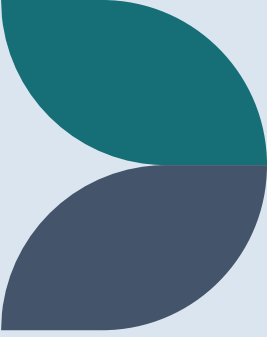
What about a reporting party from outside the institution who reports against a current student or employee?



A Note about Sex-Based Discrimination

Discrimination based on sex or gender (i.e., adverse or preferential treatment based on someone's sex, gender identity, sexual orientation, etc.) is still prohibited under Title IX; however, institutions are not obligated to implement all the same Grievance Process requirements as stated in the regulations in order to address and/or investigate those types of concerns.

When Title IX does not apply



- Conduct that occurs outside the US; however, VAWA might still apply in these instances
- Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive
- Sexual harassment that occurs outside an institution's education program or activity

Which process should we use?

Does the allegation fit under Title IX?
If not Title IX, what about VAWA?



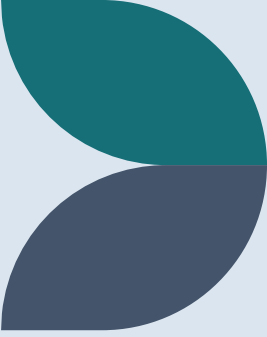
Consider:

The severity of the allegation
(severe, pervasive, AND
objectively offensive?)

Where it occurred (on/off campus,
US or abroad, etc.)

The roles of the involved parties
(students, visitors, employees,
alumni, etc.)

How might this change with the new regulations?



- **Scope:** covers all forms of gender discrimination impacting educational environment regardless of location of incidents
 - Distinction between sex-based harassment and sex-based discrimination
- **Training:** more flexibility

Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Parties have the right to an advisor of their choice
- Advisors may attend meetings and interviews with the party
- If a party does not have an advisor, the institution must provide an advisor to conduct cross-examination on the party's behalf during the hearing. These advisors are not required to be trained
- Consider Advisor Guidelines for both the general process as well as the hearing

UST “Support Person”

From UST Policy, role is to support complainant/respondent during the response and resolution process

“A Support Person may consult with and advise the party they are supporting, **but the Support Person may not otherwise participate in the University’s response and resolution process,** unless they are serving as a Hearing Advisor. The Support Person **may not speak for or submit information on behalf of the party** they are supporting as part of the response and resolution process except as described in the live hearing process.”





Advisors: The good, the bad, and the ugly



Title IX Process: What happened prior to the hearing?

- General phases of a Title IX process



Reporting Methods

Direct communication from the reporting party to the Title IX Coordinator

Third-party reports from faculty, concerned friends, RAs, etc.

Online reports

Anonymous reports

Responding to a Report

After receiving a report:

- Title IX Coordinator should reach out to the affected individual **quickly**
- Offer the affected individual an initial conversation
- Email resources the individual might need/want to take advantage of right away
- Acknowledge that if the individual does not choose to engage right now, that you will always be available going forward
- However, delaying complaints or law enforcement reports can make investigating more difficult



Initial Conversation with a Reporting Party

Process Options:

- Law enforcement report
- Grievance Process
 - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Formal Complaint
- Preservation of evidence
- Other options permitted by your policy, if not Title IX?

Supportive Measures:

- Cannot be punitive
- No-contact directives
- Accommodations for housing, classes, etc.
- Confidential resources
- Community resources
- Campus security escorts
- Etc.

**Explain that access to these resources is not contingent upon moving forward with a formal complaint*

Next steps for TIXC:

- Does the reported incident fall within the scope of your policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Formal Complaint if reporting party declines Grievance Process?



Starting the Grievance Process

Formal Complaint initiated by Reporting Party

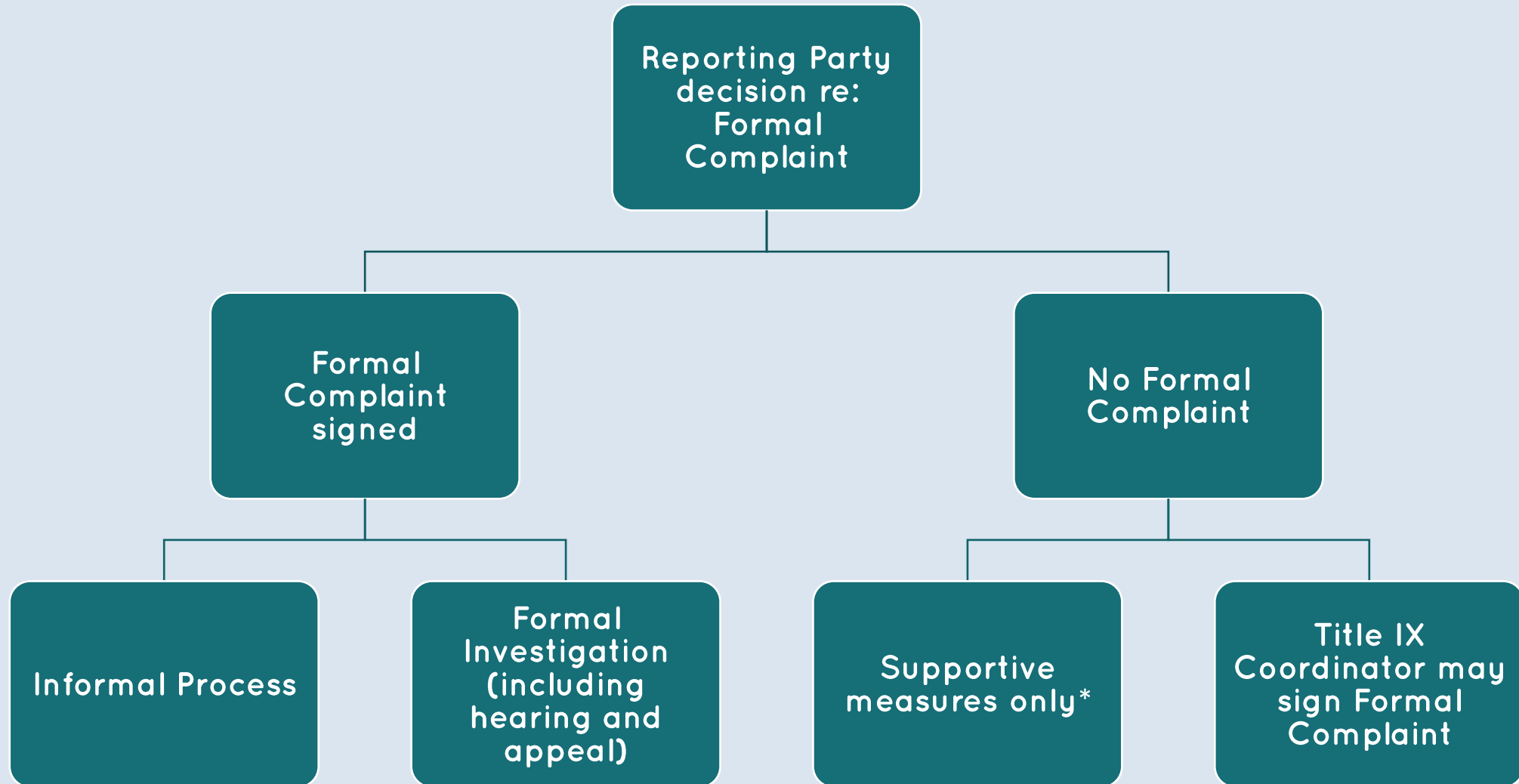
- Can initiate at any time
- Requests an investigation
- Must be signed and in writing, but can be on paper or electronic (i.e., via email)

Formal Complaint initiated by TIXC

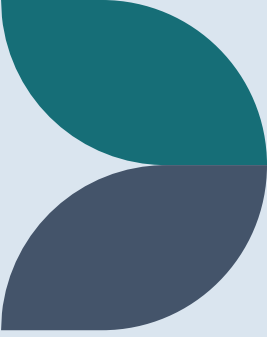
Consider:

- Egregiousness of allegations?
- Use of weapon?
- Risk? Threat?
- Availability of evidence?
- Discuss with Deputies or Title IX Team
- If proceeding, notify reporting party





A Note about “Dismissed” Formal Complaints



- Institutions may dismiss Formal Complaints or allegations within Complaints either because it's required under the current regulations or due to institutional discretion.
- Institutions must offer the party/parties the option to appeal the dismissal decision.
- Decision-makers could be called upon to make a determination about an appeal of a dismissal decision.

Dismissal

Mandatory Dismissal

TIXC required to dismiss a formal complaint if:

- at the time of the complaint, the reporting party is not participating/attempting to participate in the institution's program/activity
- the alleged conduct, even if proved, would not meet the sexual harassment definition
- the alleged conduct did not occur in the institution's program or activity
- the alleged conduct happened outside the U.S.

Permissive Dismissal

TIXC may dismiss a formal complaint prior to a final decision if:

- Reporting party withdraws from the process (needs to be in writing)
- Responding party is no longer a student/employee at the institution
- Circumstances prevent the institution from collecting sufficient evidence



Emergency removal & administrative leave

Institution may remove a student responding party IF:

- Institution goes through an individualized safety/risk assessment
- Institution decides that an immediate threat to the physical health or safety arising from the allegations exists
- Institution provides the responding party an opportunity to challenge the removal decision

Institution may place non-student employees on leave:

- while a Grievance Process is pending



Due Process & Rights of the Parties

Notice of policies, meetings, investigation, outcome, etc.*

Supportive measures
(cannot penalize responding party in any way unless and until they are found responsible)

Impartial Title IX personnel

Ability to discuss allegations

Advisor of choice

Opportunity to identify witnesses and provide evidence

Ability to review evidence and investigation report

Ability to appeal

**Must include that the responding party is presumed not responsible until a determination is made at the end of the grievance process.*

Notice of Allegations

- Notice of grievance process and the informal process
- Information about the allegations known at the time (names, conduct constituting sexual harassment, date and location of incident)
- Responding party presumed not responsible, and that the determination of responsibility occurs at conclusion of the process
- Rights of parties to an advisor, to review evidence, etc.
- Any code of conduct provision prohibiting knowingly making false statements/submitting false information
- Provide with sufficient time for parties to prepare a response
- **If additional allegations arise during the process, provide an amended or additional notice to both parties*



Consolidation of Complaints

“An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, *where the allegations of sexual harassment arise out of the same facts or circumstances.*”

Cross-complaints

Does the process change at all when both parties are accusing each other of misconduct?



The Informal Resolution Process

- Can take the shape of shuttle diplomacy, mediation, etc.
- Parties might have attempted to address the matter through an Informal Resolution Process prior to an investigation/hearing process.
- The opportunity to pursue Informal Resolution can be available up until a responsibility determination is made.

The Investigation

Title IX Coordinator determines who the investigator will be

Investigator determines investigation strategy (in coordination with TIXC)

Witness and party interviews

Evidence collection

UST Policy – Hearing or no hearing?

- For all **Title IX-based sexual misconduct** investigations, hearings are required.
- For **non-Title IX-based sexual misconduct** in which either/both parties are students, hearing is only required if suspension or expulsion are possible outcomes.
 - Title IX Coordinator makes this determination based on the Formal Complaint
 - If suspension/expulsion are not possible outcomes, the Investigator determines responsibility



Directly Related Evidence Review

Must:

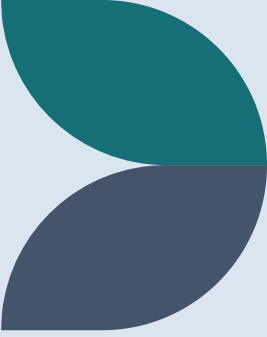
- Provide review of evidence “directly related” to the allegations for parties and their advisors
- Include inculpatory and exculpatory evidence
- Include evidence upon which the institution does not intend to rely upon in making a decision

Next steps:

- Allow at least 10 days for review and submission of a response
- Provide copies of evidence directly to parties/advisors in electronic or hard copy format
- Evidence must be made available for review at the hearing
- If responses are submitted, investigator considers them prior to completing the Investigation Report
- Additional evidence collection needed? Other action?



What about...



- Evidence related to sexual history?
- Privileged information?
 - Cannot require or allow this unless privilege has been waived by the party
- Treatment/health records?
 - Only permissible if party provides voluntary, written consent to include
- Redactions?
- Ensuring parties/advisors don't share the evidence with others?
- Can/should parties see each other's responses to the evidence?
- Close of evidence?

Reporting Party's sexual behavior

- Information about a reporting party's sexual behavior or predisposition is not permitted in the Investigation Report or during the hearing *unless*:

The information is being used to prove someone other than the responding party committed the misconduct

OR

The information relates to prior sexual behavior between the reporting and responding parties and is submitted *in an effort to prove consent*



UST – Preliminary Investigation Report

“The preliminary factfinding report will contain a summary of the interview(s) with each party and witness and will identify all evidence initially determined by the Investigator(s) to be relevant to the investigation.”

- Parties review directly related evidence and Preliminary Report simultaneously.
- Parties may provide a response to the investigator after their review.



Final Investigation Report and Review

- Summary of relevant evidence written by the Investigator
- Must be made available for parties and advisors to review (in hard copy or electronic format) 10 days prior to hearing
- Written responses to the report are permitted and provided to the hearing panel
- Consider having the investigator share the report with the TIXC prior to sharing with the parties/advisors to ensure adherence to the institution's policies and procedures



UST – Final Report contains recommendation regarding Responsibility

- ❖ In matters of **Title IX-based sexual misconduct** or **non-Title IX-based sexual misconduct that may result in suspension/expulsion**, the Investigator includes a **recommendation** of whether the respondent should be found responsible for violating the policy or not.
 - ❖ Investigator includes the reasons for their recommendation
 - ❖ Will discuss this when talking about hearing panel deliberation
- ❖ For **non-Title IX-based sexual misconduct for which suspension/expulsion are not potential sanctions**, Investigator makes the **final determination** of responsibility.
 - ❖ Investigator includes the reasons for their decision



Hearing Basics

- Requirements
- Standard of evidence
- Conflicts of interest and bias
- Attendance
- Role of the Hearing Chair
- Technology
- Decorum and other rules



The Hearing

- Needs to be live but can be virtual (must include video)
- Provides opportunity for parties' advisors to ask questions of the other party and witnesses
- Institutions must provide an advisor to parties who do not have an advisor during the hearing specifically for the questioning portion
- Can have a single decision-maker or multiple, but someone must make relevancy determinations during the hearing
- TIXC or another individual may be present to enforce hearing decorum and process
- Must be recorded

Standards of Evidence

- **Preponderance of the evidence:** “more likely than not” that the policy was violated (50.1% and above).
- **Clear and convincing standard:** highly and substantially more likely to be true than untrue.

Conflicts of Interest



Biases *for* or *against* reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process

Avoiding Bias

Bias = tendency to like or dislike; may involve stereotypes

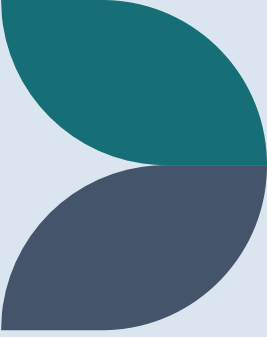
Might be implicit

Avoid prejudgment of the facts

Frequent biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion
- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status

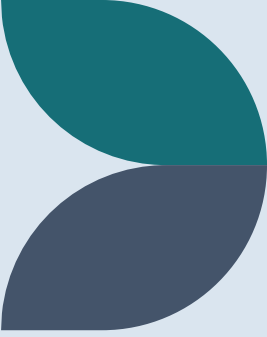




Discussion Question

What should you do if you know you have a bias or conflict of interest related to a specific case?

What happens if a party states that they have a concern with one of the decision-makers?



Conflict, or not?

- Complainant is a star athlete, and her coach is a member of the panel pool.
- Respondent worked with one of the decision-makers on a potential conduct violation.
- Susan, the investigator, majored in Women and Gender Studies as an undergrad.
- Complainant is an Econ major, and one of the decision-makers is an Econ professor.

Who attends the hearing?

- Hearing Panel members
- Hearing Panel chair
- The parties and their advisors
- Witnesses who the parties or the decision-makers have identified as needing to be present for questioning
- Title IX Coordinator may attend (to help with logistics, decorum issues, hearing process, etc.)
- General counsel may attend (or be on standby for questions)
- Investigator may attend



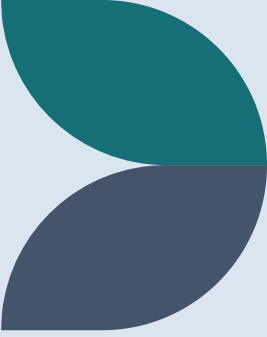
Role of the Hearing Panel Chair

- Facilitate the hearing, with assistance from TIXC.
- Make relevancy determinations for all questions asked during the hearing.
- Make determinations about appropriateness of questions or information provided (cannot be irrelevant, abusive, or overly repetitive).
- Ensure advisors stay in line with hearing decorum guidelines.

Hearing technology

- This will vary depending on the institution.
- Decision-makers need to be trained in how to use their institution's hearing technology.
- Remember that hearings need to be recorded.
- Pros and cons of various hearing tech setups? What has worked well, and what hasn't?

Hearing Decorum and Other Rules



- OK for hearing panel to take breaks to deliberate or to confer with general counsel.
- Be professional at all times. Maintain an awareness of tone, body language, facial expressions, etc.
- Expectation that all individuals present at the hearing demonstrate respect towards others.
- Advisors only speak during questioning
- Others?

Hearing Preparation

- Pre-hearing meetings
- Relevant vs. Related Evidence
- Assessing credibility
- Developing questions
- Review of the hearing steps at your institution
- Day of the hearing

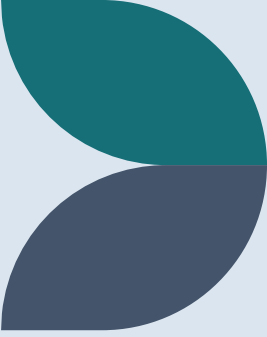


Hearing Preparation



- Get familiar with hearing format and structure (breaks, length, etc.) in coordination with TIXC
- Homework: review the institution's policy, the Notice of Investigation/Allegation, and the Investigation Report
- What questions do you plan to ask parties/witnesses during the hearing?
- Which witnesses do you want present, if any, during the hearing?
- Which witnesses do the parties want present, if any, during the hearing?
- Who will be the one to make relevance determinations?
- Does either party need a school-appointed advisor?
- Consider conducting pre-hearing meetings with each party and their advisor

Pre-hearing meetings



- Not required, but could be good practice to meet with each party and their advisor in advance of the hearing to discuss:
 - The hearing process and what to expect
 - Expectations regarding decorum, Advisors' participation, how any technology will be used during the hearing
 - Review the cross-examination phase of the hearing
 - Whether the parties want any witnesses present at the hearing
- Can be facilitated by the Chair, Decision-maker, or the TIXC

Types of Evidence

Direct or
testimonial
evidence

Documentary
evidence

Real evidence

Circumstantial
evidence

Hearsay
evidence

Character
evidence

Evidence Examples

- Interviews or statements
- Texts
- Emails
- Social media posts
- Journal entries or letters
- Dating apps
- Videos
- Photographs
- Public Safety reports
- Expert reports
- Medical reports
- Keycard swipes
- Voicemails
- Wi-Fi pings
- Phone records
- Polygraph results
- Clothing
- Physical items (weapons, trash, etc.)



Relevant vs. Related Evidence

Relevant

Evidence is considered relevant “if it has the tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”

Federal Rules of Evidence 401

Directly Related

Directly related evidence “includes evidence that the institution does not intend to rely upon in reaching a determination regarding responsibility, including inculpatory and exculpatory evidence, whether obtained from a party or other source.”

34 C.F.R. § 106.45(b)(5)(vi)



Relevant Evidence

Tends to prove a fact at issue in the hearing, such as

- whether a disputed incident occurred;
- witness credibility;
- the impact of any misconduct on the complainant (e.g. mental or emotional distress, physical injury, or academic difficulty); and
- what sanctions or remedies might be appropriate.



Relevant Evidence

In summary:

Does the evidence tend to **prove** or **disprove** the allegations?

A determination regarding relevancy can rely on logic, experience, or science.

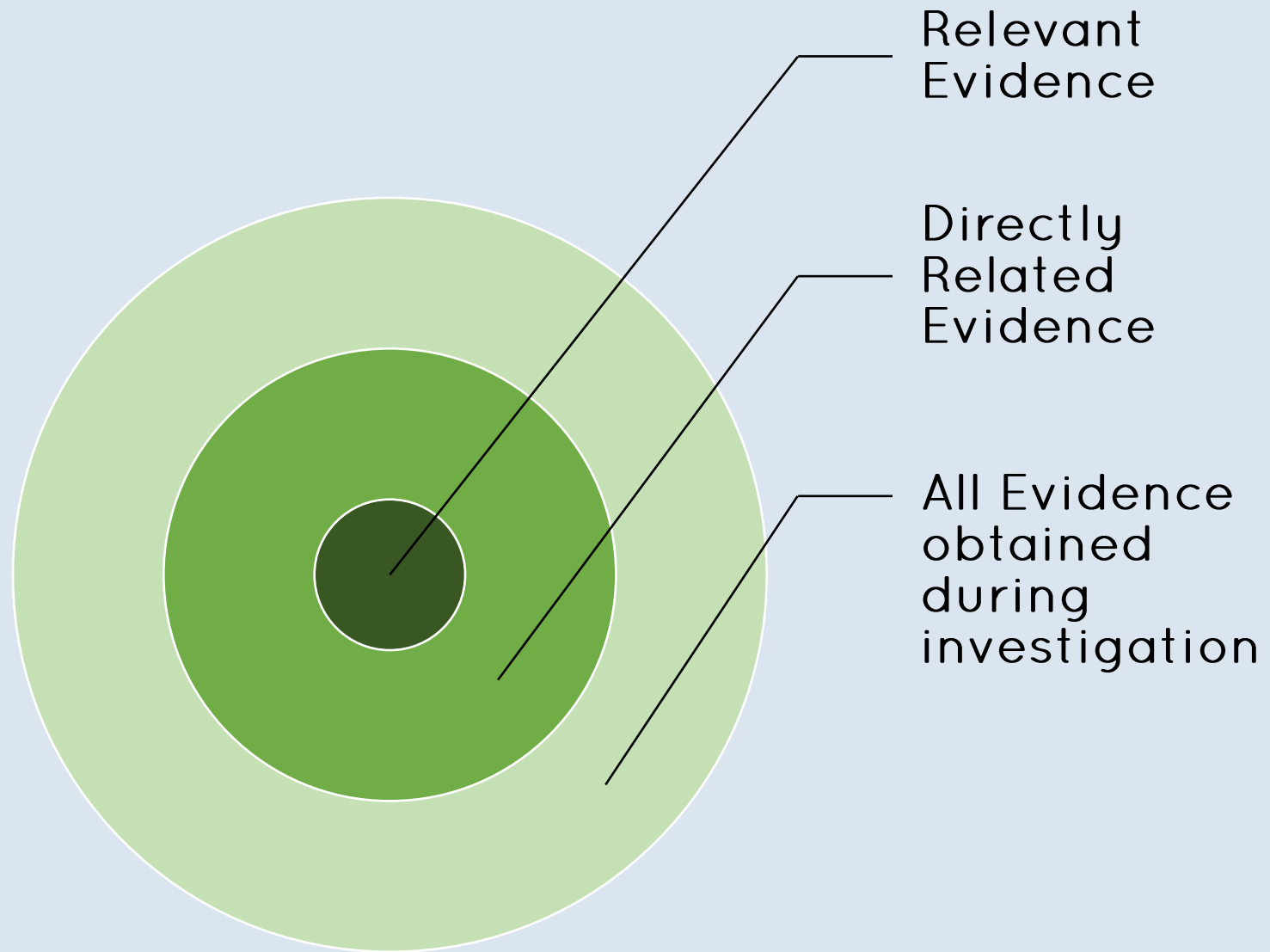
FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401



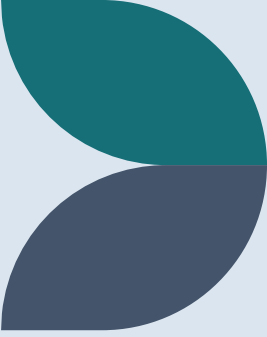
Directly Related Evidence

- No given definition.
- Common sense evaluation.
- Arguably a very wide net.





Examples: Relevant or Related?



What the
Complainant had
for dinner

Fact that the
parties are in the
same math class

Witness
statement that
the skies were
clear on the night
of the incident

Assessing Credibility

Credibility: The extent to which the decision-maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.

EEOC Statement on credibility in Sexual Harassment Cases (1999)

Inherent plausibility

Is the testimony believable on its face?
Does it make sense?

Demeanor

Did the person seem to be telling the truth or lying?

Motive to falsify

Did the person have a reason to lie?

Past record

Did the alleged harasser have a history of similar behavior in the past?

Corroboration

Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



Remember!

None of these factors are determinative as to credibility.

For example:

- the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility.
- the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.



Assessing Credibility Contd.

Possible Factors:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information- substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)



A Note about Demeanor

Be careful about relying on demeanor when it comes to credibility.

Much of what you hear about “how to tell if someone is lying” is not based on actual research and has been debunked or is considered pseudoscience.



It's not easy to spot a liar

✓ Associated with lying
 X No significant relationship
 ✓ Associated with truth-telling

CUES	ASSUMED RELATIONSHIP	ACTUAL RELATIONSHIP
VOCAL		
Hesitations (use of speech fillers, e.g., “ah,” “um,” “er,” “uh,” and “hmmm”)	✓	X
Speech errors (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	✓	X
High-pitched voice	✓	✓
Speech rate (number of spoken words in a certain period of time)	X	X
Latency period (period of silence between question and answer)	X	X
Pauses (silent, filled, or mixed)	✓	X
VISUAL		
Gaze aversion (looking away from the conversation partner)	✓	X
Smiles (smiling and laughing)	X	X
Facial fidgeting (face touching or rubbing hair)	✓	X
Self-fidgeting (touching, rubbing, or scratching body or face)	✓	X
Fidgeting (undifferentiated)	✓	✓
Illustrators (hand and arm movements designed to modify or supplement what is being said verbally)	X	✓
Leg and foot movements	✓	X
Posture shifts (movements made to change seating position)	✓	X
Head movements (head nods and head shakes)	✓	X
Eye blinks (blinking of the eyes)	✓	X

<https://www.smithsonianmag.com/science-nature/why-you-cant-spot-liar-just-looking-180977359/>

A Note about Past Record

Also be careful about relying on a party's past record.

Determinations should be made (mostly) based on the evidence in front of you.



A Note about Memory



Memory errors do not necessarily destroy credibility

Most people's memories are not that great

Trauma affects memory

Substance use may affect memory

A Note about Eyewitness Accounts

Can be powerful.

BUT

Well-intentioned eyewitness testimony can be problematic because our brains are not always great at accurately interpreting and remembering what we see.

And eyewitness testimony can be “contaminated.”



Assessing Credibility: Final Thoughts

- It's important to have reasons supporting credibility decisions.
- Remember that **unlikable** is not the same as **not credible**.
- Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.
- Reach your conclusions based on the evidence/information provided, **NOT** based on speculation, rumors, character assessment, etc.



Evidence Review & Developing Questions



- Review *and re-review* the Investigation Report, Notice of Allegations, and relevant policy definitions
 - If needed, go back to any specific evidence relating to areas in the Report that could provide useful clarity for you
- Note areas of consistency and undisputed facts and information
- Note areas of inconsistency and disputed facts and information
- Consider lingering questions you have after reviewing the evidence and whether to raise those during the hearing
- Ensure the answer to your potential question isn't already available in the report/evidence

Weighing the Evidence



Weight of evidence is the believability or persuasiveness of evidence in probative value, not the quantity or amount of evidence. Weight of evidence is not determined by mathematics but depends on its effect in inducing belief.

Parties may argue about the weight of certain evidence during the hearing or in written statements.

Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/wex/weight_of_evidence

Discussion Question

Which types of evidence carry the most weight?

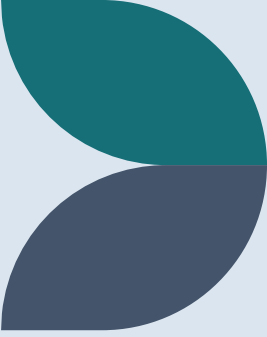
Review of hearing process at your institution

- What are the steps/phases of the hearing, and in what order?
- Will hearing panel members be in the same room? Separate rooms?
- How long do you expect the hearing to take? Should there be a time limit? What about breaks?
- What if something goes wrong?
- Who is responsible for starting/stopping the recording?

Sample Hearing Process

- Intro by Hearing Chair
- Reporting Party presentation of evidence (including bringing witnesses forward)
- Hearing Panel questioning of Reporting Party
- Responding Party advisor questions Reporting Party
- Responding Party presentation of evidence (including bringing witnesses forward)
- Hearing Panel questioning of Responding Party
- Reporting Party advisor questions Responding Party
- Optional closing statement from each party
- Closing by Hearing Chair

Hearing Chair intro outline (example)



- Introduction of Hearing Panel members, what they've reviewed, and what their role is
- Purpose of Hearing
- Hearing Process overview
- Hearing decorum reminders
- Standard of proof
- Impact of nonparticipation
- Definitions of charges

Day of the hearing



BE. ON. TIME.
Block your
schedule
accordingly.



Look professional.
Be cognizant of
potential
distractions.



Consider internet
speed and
reliability.



Bring
snacks/water.



Bring pen,
notepad, etc.



Silence cell
phones and other
devices.

The Hearing

- Questioning
- Relevancy determinations
- Difficult situations





Hearing Panel questioning

- Questions should help clarify any vague details or fill in gaps
- Remember to stay focused on the information that matters
- Consider your approach with the question: How will you phrase it? Who is it directed towards? Should another panel member be the one to ask the question?
- Ensure your question is clear, neutral, and easily understood

Cross-examination and advisors

Cross-examination

Parties, through their advisors, are permitted to ask questions of the other party and any witnesses

Direct-examination

Advisors may also question their own advisee

Relevancy Decisions

The Hearing Panel Chair is responsible for determining whether each question asked is relevant AND explaining any decision to exclude a question as not relevant



Relevancy Determinations

Does the information help me in deciding if there was a policy violation?

Does it “move the dial” in proving or disproving the allegations?

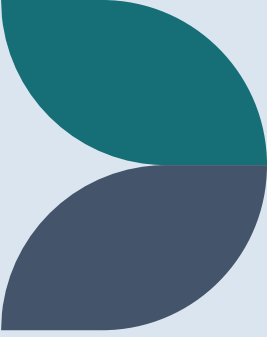
Off limits:

- Medical or treatment records without voluntary, written consent
- Reporting party’s prior sexual history (with two exceptions)
- Legally privileged information unless party waives privilege

- Know where the line is regarding evidence or questioning intended only to harass or embarrass another party
- What about Responding Party’s prior or subsequent misconduct?
- What about evidence or questioning that is duplicative or repetitive?



Questioning Skills & Tips



- Even if you hear something surprising, try to remain neutral.
- Stay flexible, both in terms of your questioning but also regarding the flow of the hearing.
- Practice active listening.
 - What does this mean?
- Others?

Difficult situations

- What if a party doesn't show up to the hearing?
- What if a party refuses to answer a question?
- What if an advisor starts violating one of your hearing guidelines?

Making a decision

- Overview of the deliberation process
- Sanctions and Remedies
- Written determination



Overview of the Deliberation Process

Standard of Evidence

Preponderance of the evidence (“more likely than not” / 50.1% likely)

Process

Hearing panel members need to meet after the hearing to deliberate or can meet privately during the hearing.

Apply the applicable policy definitions to the evidence provided.

Decision-Makers

- What are the undisputed facts and what are the disputed facts?
- What does the evidence show regarding the disputed facts? Which evidence is most credible? Why?
- Using the appropriate standard of evidence, did a policy violation occur? Analyze each element of a policy definition under the evidence standard.
- What is the rationale for your decision?



The Deliberation Process

- Must provide a detailed, written rationale for the Hearing Panel's decision; must include evidence supporting the conclusions.
- Have the policy definitions close at hand for reference.
- Assess the weight of evidence provided.
- First determine your finding(s) about the allegation(s); then move on to sanctioning if applicable.
 - Provide a rationale for each finding/allegation.
 - Impact statements may be helpful when considering sanctions.



What about the
Investigator's recommendation
regarding responsibility?

Sanctions & Remedies

Need to stop, prevent, and remedy!

Consider educational and developmental sanctions

Engage in a risk assessment to help determine appropriate sanctions

Sanctions should reflect the severity of the behavior (consider prior misconduct)

Consider any loss/injuries to the Reporting Party or the institution and how to rectify those, if possible

Can consider past cases of similar misconduct with assistance from Title IX Coordinator



UST - Sanctions

Title IX-based sexual misconduct & non-Title IX-based sexual misconduct in which suspension/expulsion are potential sanctions:

- The hearing panel determines appropriate sanctions in consultation with appropriate UST administrator (see next slide)

Non-Title IX-based sexual misconduct in which suspension/expulsion are NOT potential sanctions:

- TIXC consults with UST administrator to determine sanctions



If the Respondent is a(n) . . .	Sanctions will be determined by or in consultation with the . . .
Undergraduate student	Dean of Students, in consultation with the Response Manager and, if different, the Title IX Coordinator, and if appropriate under the circumstances, such as matters involving students in licensure programs, the dean of the applicable college or school
Graduate or professional student	Dean of Students and dean of the applicable college or school, in consultation with the Response Manager and, if different, the Title IX Coordinator
Faculty or staff member	The member of the President’s Cabinet with the most direct responsibility for the Respondent’s school, college or unit and the Chief Human Resources Officer or designee, in consultation with the Response Manager and, if different, the Title IX Coordinator
Both a student and an employee	Dean of Students and Chief Human Resources Officer or designee, in consultation with the Title IX Coordinator
Not a student or employee	Title IX Coordinator, in consultation with Public Safety and any other appropriate administrators



Discussion Question

What if responding party is making a case that they were mentally ill at the time of the incident? Neurodivergence? Concussion? Does that impact your decision and if so, how?

Common Sanctions & Remedies

Students

- Probation
- Loss of leadership positions
- Loss of privileges
- Housing changes
- Limited access to campus
- Counseling or required education
- Suspension
- Expulsion

Employees

- Loss of leadership positions
- Loss of privileges
- Required education
- Disciplinary letter
- Unpaid suspension
- Demotion
- Termination



Notice of Decision

Needs to include:

- Allegations
- Procedural steps
- Findings of fact
- Decision(s) regarding responsibility
- Rationale for each allegation/decision
- Sanctions, if applicable, and rationale
- Whether remedies will be provided
- Appeal process information

Other requirements:

- Deliver notice simultaneously to the parties
- Decision/sanctions become final when parties are notified of the appeal decision OR when the deadline to submit an appeal has passed



Appeals

- Process
- Grounds for appeal



The Appeal Process

Available to both parties for final determination of responsibility and dismissal of formal complaints



Required reasons for appeal:

Procedural irregularity that affected the outcome

New evidence that was not reasonably available at the time the decision was made that could affect the outcome

Conflicts of interest or bias from an official involved in the case that affected the outcome

Can allow additional grounds for appeal if desired

UST – Appeal Grounds

- A) A procedural irregularity occurred that affected the outcome of the process, **including but not limited to that the decision was not supported by a preponderance of the evidence or was arbitrary and capricious;**
- B) The decision violated academic freedom;**
- C) There has been discovery of new evidence by the appealing party that was not reasonably available at the time of the determination regarding responsibility that could affect the outcome of the matter;
- D) The Title IX Coordinator, Investigator(s), or hearing panel had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome

Appeal Process contd.

Requirements

- Appeal decision-maker cannot have been previously involved in the process
 - No conflict of interest or bias
 - Required training
 - Cannot be TIXC, Investigator, or decision-makers from hearing
- Timeframe for accepting appeals?
- Let parties know if an appeal was received and that the other party has an opportunity to respond
- Must send appeal decision and rationale to parties simultaneously

Possible Appeal Determinations

- Hearing Panel/Dismissal decision stands
- Hearing Panel/Dismissal decision overturned
- Sanction adjusted
- Remand
 - New investigation
 - New hearing or re-hearing
 - Sanctions-only re-hearing



UST - Appeal Officers

Generally determined based on the identity of the Responding Party.

If the Respondent is a ...	The Appeal Officer is ...
Student (who is not also a regular faculty or staff member)	The Vice President for Student Affairs
Faculty or staff member (who is not a student worker)	Executive Vice President and Provost

**TIXC may appoint an alternate Appeal Officer who has received appropriate training if conflicts of interest or other issues are at play*



UST – Appointment of Appeal Board

Staff or faculty respondent:

- Appeal Officer appoints an appeal board comprised of five UST employees who do not have conflicts of interest and who have not served as Investigators, hearing panel members, or the TIXC.
- If faculty respondent, members of the appeal board will be full-time tenured faculty members selected in accordance with the Faculty Handbook.

Student respondent:

- Appeal Officer may consider the appeal directly or may appoint an appeal board of 3-5 employees who are faculty or staff (not student workers).

*All appeal board members must receive training.

*Appeal board appoints a chair from among its members.



UST – Consideration of Appeal

The Appeal Board/Appeal Officer:

- Will review the appeal, any response submitted by the other party, the notices of outcome, hearing panel determination (if any) and the final factfinding report and consider any previously undiscovered evidence (if discovery of new evidence is a ground for appeal).
- May choose to meet with the parties, the Investigator(s), hearing panel members, or others and consider other additional information, in its (or the Appeal Officer's) sole discretion.
- Will consider whether it is more likely than not that the designated grounds for appeal have been satisfied.



UST – Consideration of Appeal contd.

If an appeal board is used, members will:

- Attempt to reach consensus. If consensus cannot be reached, the board will vote.
 - Deliberations are confidential.
- Provide the Appeal Officer with a written report of its findings and recommendations for next steps.
 - Appeal Officer is not bound by the Appeal Board's recommendation.
 - Appeal Officer notifies parties of the outcome.

If NO appeal board is used, Appeal Officer:

- Issues written decision stating findings and determination

UST - Appeal Notice

For matters of sexual assault, dating violence, domestic violence, and stalking, include:

- Description of any change(s) to the outcome
- Rationale for the determination
- Whether the result is final
- When the determination will become final, if applicable.



Final thoughts

- Wrapping up the process
- What about the proposed regs?
- Recordkeeping and documentation



Wrapping up the process

No appeals?

- Send a notice once the appeal deadline has passed notifying both parties that no one appealed, and that the hearing panel's decision is now final.

Appeal?

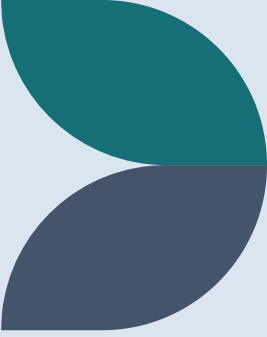
- You will have sent the final notice to both parties simultaneously notifying them that the process is over and what the appeal determination was.

Either way...

- TIXC to follow up with responding party regarding any sanctions requiring additional steps or involvement.
- TIXC - consider setting calendar reminders to check in on parties once the process is over.
- Consider requesting feedback from the parties about their experience during the process.

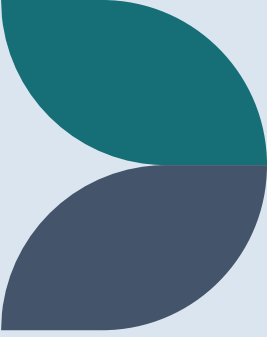


What about the proposed regs?



- Broader scope for sexual harassment definition
- Supportive measures may burden respondent during grievance process, with restrictions.
- No more formal complaint requirement.
- No more mandatory dismissal, but institutions may dismiss for reasons such as complainant withdraws, respondent not participating in a program or activity, etc.
- Live hearing no longer required; however, must provide opportunity for decision-maker(s) to adequately assess credibility of witnesses.
- Athletics – Institutions cannot categorically ban trans students from participating on the sports team corresponding with their gender identity.
- More explicit and proactive requirements meant to protect pregnant students and employees.

Recordkeeping



Records must be retained for at least **seven years.**



Records to maintain:

- Actions taken and responses to reports
- Investigation and adjudication documents, recordings, etc.
- Training materials for decision-makers, investigators, Title IX Coordinators/Deputies, and informal resolution facilitators

Discussion?
Questions?



Scenario

Kris and Petra met on Tinder, where they exchanged messages and agreed to meet up “for some naked smash.” Petra went to Kris’s dorm room, where they conversed for a few minutes, then started making out while lying down on Kris’s bed. During the investigation, Petra reported that they each removed their own clothing. Petra told the investigator they “both just started kissing” and that she “didn’t mind” when Kris started touching her chest and buttocks. She said they were “both into it,” but then Kris started putting their fingers into her vagina, which she did not consent to and did not want. She said she told Kris to stop, but they took “a really long time” before they removed their fingers. She said she thinks she had to tell Kris to stop “at least twice.” Petra said she then told Kris she was not okay with what was happening, and she got up, got dressed, and left. Kris told the investigator that Petra “essentially agreed” in their Tinder messaging to have sex, so “anything was on the table.” Kris also said Petra was “enjoying herself and into it” and that they understood from Petra’s participation in the touching and kissing that she consented to vaginal contact. Kris said that as soon as they heard Petra say, “stop doing that,” they removed their fingers from her vagina.

Scenario

Michael and Jenna dated for six months last year. On a Saturday in May, they attended their college’s “spring fling”—an outside music festival that starts at 2 p.m. and goes until 10 p.m. They started drinking vodka (which Michael provided) from water bottles when they arrived at the festival around 2 p.m. Jenna told the investigator that she “kept drinking from my bottle pretty regularly” until around 7 p.m., when she and Michael left the festival. She said she also drank water during this time, but she did not eat anything. (Jenna is 5’6” and weighs 115 pounds.) The water bottle was a standard 16-ounce bottle, and it was empty by 7 p.m. The day was unseasonably warm and sunny, and they both got sunburned. When they left the festival at 7 p.m., they went to Michael’s room, where they had sex. Michael agrees with this account of the day. Jenna tells the investigator she was blacked out at that point, does not remember having sex with Michael, but does remember waking up naked in his bed around midnight. At that point, they joked about her being “really wasted” while they were at the festival. Michael says he remembers joking about that, but says Jenna was walking and talking “pretty normal” when they went to his room—she was just “a little goofy and more outgoing.” Michael produces texts from Jenna with a timestamp of 5:38 p.m., indicating she had gone to the bathroom and was trying to find him. The texts are coherent.

Keep in touch!

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 www.somsull.com/ballast

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